87-827

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHARLES FRIED
Solicitor General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Counsel for Appellate Litigation

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the court of appeals correctly held that a writ of mandamus should issue directing the Secretary of Labor to reopen for reconsideration under *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985), claims for benefits brought under the Black Lung Benefits Acts, 30 U.S.C. 901 *et seq.*, that had been finally denied prior to *Coughlan*.

PARTIES TO THE PROCEEDING

In addition to James Sebben (whose name, which has been misspelled throughout this litigation, is actually Seddon), this suit was brought by John Cossolotto, Bruno Lenzini, and Charles Tonelli on behalf of themselves and all others similarly situated. In addition to the Secretary of Labor, they named as defendants the Department of Labor and Steven Breeskin, the Acting Deputy Commissioner of the Department's Division of Coal Mine Workers' Compensation. Old Republic Insurance Company, Pittston Coal Group, Consolidation Coal Company, Island Creek Coal Company, Pennsylvania National Insurance Group, and Barnes and Tucker Company intervened in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

DENNIS E. WHITFIELD, DEPUTY
SECRETARY OF LABOR, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Deputy Secretary of Labor and the Acting Deputy Commissioner of the Department of Labor's Division of Coal Mine Workers' Compensation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 815 F.2d 475. The opinion of the district court (App., *infra*, 19a-22a) is unreported.

JURISDICTION

The judgment was entered on March 25, 1987. The order denying the Secretary's petition for rehearing was entered on June 25, 1987 (App., *infra*, 23a). On September 17, 1987, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including November 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory and regulatory framework.* The Black Lung Benefits Act, 30 U.S.C. (& Supp. III) 901 *et seq.*, provides benefits to coal miners who "(1) had pneumoconiosis, [1] (2) that arose out of coal mine employment, (3) causing total disability or death" (App. 6a). A miner is totally disabled under the Act when he is unable to perform the type of work he did as a coal miner (30 U.S.C. (& Supp. III) 902(f)(1)(A)).[2] Claims filed before July 1, 1973, under "Part B" of the Act, were considered by the Department of Health, Education, and Welfare (HEW), and benefits were paid by the federal government. 30 U.S.C. 921a, 924. Claims filed after that date, and adjudicated under "Part C" of the Act, are considered by the Department of Labor. 30 U.S.C. (& Supp. III) 925, 932. Coal mine operators bear primary responsibility for paying Part C benefits. 30 U.S.C. 932(b).[3] The

[1] Pneumoconiosis is a lung disease caused by exposure to various types of dust, such as coal dust and asbestos. Lopatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W. Va. L. Rev. 677, 679 & n.13 (1983). When caused by coal dust, it is known as black lung disease. The statute (30 U.S.C. 902(b)) and the regulations (20 C.F.R. 727.202) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment. For clarity, we will use "pneumoconiosis" to refer solely to the disease, treating the question of causation as distinct.

[2] As originally enacted in 1969, the Black Lung Benefits Act required a claimant to prove that he was unable to perform any type of work in order to establish total disability. Congress liberalized the standard of total disability in 1972. Pub. L. No. 92-303 § 4(a), 86 Stat. 153. It also provided that benefits could not be denied solely on the basis that an X-ray failed to show an opacity on the lung (§ 4(f), 86 Stat. 154). Congress ordered previously adjudicated claims reopened in light of the 1972 amendments. § 1(c)(2), 86 Stat. 152-153; App., *infra*, 6a-7a; Lopatto, *supra*, 85 W. Va. L. Rev. at 685.

[3] For Part C claims brought by miners who last worked in coal mines before 1970, or where a responsible operator cannot be identified, benefits are paid from the Black Lung Disability Trust Fund, which is financed by an excise tax on coal. 30 U.S.C. (& Supp. III) 932-934. The Fund may borrow from the United States Treasury (26 U.S.C. 9501(c)), and is currently in debt.

Act provides for administrative adjudication of claims followed by judicial review. Under Part C, a claimant may appeal the denial of a claim for benefits rendered by the Department of Labor's Office of Workers' Compensation Programs, within 60 days, to an administrative law judge (20 C.F.R. 725.410(c)), then, within 30 days, to the Benefits Review Board, and then, within 60 days, to a court of appeals (30 U.S.C. 932(a) (incorporating 33 U.S.C. 921)).

HEW enacted an interim regulation, 20 C.F.R. 410.490, providing that a miner filing a Part B claim would be presumed to be totally disabled if he presented certain types of proof with respect to the existence of pneumoconiosis or its severity and with respect to the cause of the pneumoconiosis. HEW's interim Part B regulation provided that a claimant was entitled to a presumption of total disability if an X-ray, biopsy, or autopsy established the existence of pneumoconiosis and the impairment arose out of coal mine employment (20 C.F.R. 410.490(b)(1)(i) and (2)). With respect to the proof of causation required by claimants presenting such evidence, the regulation provided, first, that if a miner worked for ten years in a coal mine his pneumoconiosis was presumed to arise from his coal mine employment, and, second, that in any other case the claimant "must submit the evidence necessary to establish that the pneumoconiosis arose out of employment in the Nation's coal mines" (20 C.F.R. 410.416, 410.456).[4] As a result, a

[4] While the regulation did not specifically address how a miner with less than ten years of work in coal mines could prove that his pneumoconiosis arose from coal mine employment, a claimant may establish causation by proving that he was exposed to some substantial

miner who worked for less than ten years in a coal mine could establish a presumption of total disability under HEW's regulation governing Part B claims by showing the existence of pneumoconiosis by means of an X-ray and presenting evidence supporting the claim that coal mine work caused the pneumoconiosis. Under HEW's interim Part B regulation, the presumption of total disability could be rebutted by "evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work" or by other evidence, "including physical performance tests * * * establish[ing] that the individual is able to do his usual coal mine work or comparable and gainful work." 20 C.F.R. 410.490(c).

In 1972, HEW promulgated permanent regulations, set forth at 410.401 to 410.476, to govern the Part C program. It was more difficult to establish total disability under HEW's permanent regulations than under its interim Part B regulation. An irrebuttable presumption of total disability was available under HEW's permanent regulations, but only if X-ray evidence was presented showing severe damage to the lung (20 C.F.R. 410.418) whereas, under the interim Part B regulations, a rebuttable presumption could be established by X-ray evidence showing much less damage. Total disability could also be established under HEW's Part C regulations by means of ventilatory studies and blood-gas tests (20 C.F.R. 410.424, 410.426), as well as by other proof that the claimant could no longer perform the type of work he did as a coal miner (20 C.F.R. 410.412). However, the ventilatory study scores required to establish total disability were much stricter than the scores establishing the presumption of total disability under the regulation governing the Part B program (compare 20 C.F.R. 410.426(b) with 410.490(b)(1)(ii)). Moreover, no rebuttable presumption of total disability was available under HEW's permanent regulations.

---

amount of coal dust as a result of work in coal mines and by showing that his pneumoconiosis was unlikely to have been caused by exposure to other sorts of lung irritants.

Congress amended the Act in 1977, giving the Secretary of Labor authority to promulgate the final regulations governing the Part C program, which have been in place since 1980 and are set forth at 20 C.F.R. Pt. 718. It also directed the Secretary to reopen claims that had been denied prior to the effective date of the 1977 amendments (30 U.S.C. 945). Congress provided that, in determining whether those claimants, along with any other claimants who filed claims before the Secretary's final regulations were promulgated, were totally disabled, the "[c]riteria applied by the Secretary of Labor * * * shall not be more restrictive than the criteria applicable" to Part B claims (30 U.S.C. (& Supp. III) 902(f)(2)).

The Secretary promulgated an interim regulation in 1978, 20 C.F.R. 727.203, that provides a presumption of total disability that is similar but not identical to the presumption in Section 410.490, which governed Part B claims. The Secretary's interim presumption is more generous to claimants in certain ways. Unlike HEW's interim Part B regulation, the Secretary's interim regulation also provides that, in addition to X-rays and ventilatory studies, the presumption of total disability can be established by blood-gas studies, other medical evidence including a physician's opinion, and, in the case of a deceased miner and in the absence of relevant medical evidence, by the affidavit of a survivor (20 C.F.R. 727.203(a)(3)-(5)). At the same time, however, the Secretary's interim regulation allowed the presumption of total disability based on an X-ray, biopsy, or autopsy only if a claimant worked in coal mines for ten years (20 C.F.R. 727.203(a)(1)). A claimant could not, as under the interim Part B regulation, gain the benefit of the presumption by relying in part on other evidence to show causation by coal

mine employment, but could trigger the presumption only if he had worked in coal mines for at least ten years. The Secretary's interim regulation provides for rebuttal of the presumption of total disability by evidence showing that the claimant is performing or could perform coal mine work (20 C.F.R. 727.203(b)).

2. *The merits issue.* Five circuits have considered whether the Secretary's interim regulation conflicts with Congress's directive in Section 902(f)(2) that reopened claims and claims filed before the Secretary's permanent regulations became effective be considered under "[c]riteria * * * [that] shall not be more restrictive than the criteria applicable to a claim" considered under HEW's regulation governing Part B claims. The first court to do so was the Third Circuit. It concluded, in *Halon* v. *Director, Office of Workers' Compensation Programs,* 713 F.2d 21 (1983), that the Secretary's interim regulation contained more restrictive "criteria" than HEW's interim regulation, contrary to Section 902(f)(2), because the Secretary's interim presumption could not be established by a miner who worked in coal mines for less than ten years. Judge Weis dissented in *Halon.* He agreed with the Department that the "criteria" referred to in Section 902(f)(2) were *medical* criteria and that Congress did not intend to require the Secretary to apply the same evidentiary rules and adjudicatory standards applicable under HEW's Part B regulation.[5]

[5] Judge Weis reviewed in detail the legislative history of the 1977 amendments, concluding that Congress was motivated to act because the medical requirements necessary to establish total disability under HEW's permanent regulations were more restrictive than the medical requirements in HEW's interim regulations. The final wording of Section 902(f) was drafted in conference, and the Conference Report stated that, while the Secretary was authorized to "promulgate new medical standards to be applied to all Part C claims," until the Secretary's final regulations were promulgated "the so-called 'interim' part B medical standards are to be applied to all reviewed and pending claims" (see 713 F.2d at 28-29). Judge Weis noted the uses of "medical" in that description, and contrasted it with "the only reference to the use of presumptions" in the Conference Report (*id.* at 29). That reference stated that "all standards are to incorporate the presumptions contained in section 411(c) of the Act," which provides that there is a rebuttable presumption that pneumoconiosis arose out of coal mine employment if a miner worked for ten years in coal mines (see *ibid.*). Judge Weis also noted repeated references to the use of HEW's interim medical criteria on the floor on Congress (*ibid.*). He concluded that "the Director correctly reads the statute as requiring that no less restrictive *medical* criteria be incorporated by the Secretary of Labor into the regulations," and that "[a]s to proof that a miner's pneumoconiosis arose out of coal mine employment, the regulation incorporates, as directed by the conference committee report, the presumption contained in section 411(c)(1) of the Act, 30 U.S.C. 921(c)(1)" (713 F.2d at 29 (emphasis in original)). He also noted that the Secretary's interim regulations were submitted for comment to the House committee, and "[n]one of the congressmen was critical of the regulation's limitation to miners with at least ten years coal mine employment" (*id.* at 30).

The Eighth Circuit followed *Halon* in *Coughlan* v. *Director, Office of Workers' Compensation Programs,* 757 F.2d 966 (1985). The Seventh Circuit, however, recently upheld the Secretary's interim regulation in *Strike* v. *Director, Office of Workers' Compensation Programs,* 817 F.2d 395 (1987), relying on Judge Weis's arguments. Subsequently, the Sixth Circuit in *Kyle* v. *Director, Office of Workers' Compensation Programs,* 819 F.2d 139 (1987), and the Fourth Circuit in *Broyles* v. *Director, Office of Workers' Compensation Programs,* 824 F.2d 327 (1987), sided with the Third and Eighth Circuits. Judge Guy dissented in *Kyle,* noting that "Judge Weis made a thorough analysis of the purpose and legislative history of the statutory language in question, and I find this analysis more persuasive than that of the majority here" (819 F.2d at 144). The Department of Labor has been applying

adverse court of appeals' decisions in all cases pending in the circuit on the date of the decision.

3. *Proceedings below.* This case involves a putative class of claimants whose claims were denied under the Secretary's interim regulations, who submitted an X-ray showing the presence of pneumoconiosis,[6] and who were not presumed to be totally disabled because they had not worked in coal mines for ten years (App., *infra*, 18a). Some of the members of the putative class had claims denied prior to the 1977 amendments and their claims were reopened and again denied under the Secretary's interim regulations, while others filed claims after the 1977 amendments took effect but before the Secretary's final regulations were promulgated. The claims of the members of the putative class had been finally denied; that is, the claimant failed to exhaust his administrative remedies or seek judicial review in timely fashion. The four named plaintiffs filed this suit in the Southern District of Iowa seeking a writ of mandamus to compel the Secretary of Labor to reopen the claims of the members of their putative class and reconsider them under the standard set forth in *Coughlan*. The district court denied the application for a writ of mandamus without certifying a class (App., *infra*, 19a-22a).

The court of appeals reversed (App., *infra*, 1a-18a). The court first held that the district court had jurisdiction to issue a writ of mandamus under 28 U.S.C. 1361.[7] The

[6] The class is limited to those who submitted X-ray evidence, and does not include those seeking to trigger the presumption by relying on biopsy or autopsy evidence (App., *infra*, 18a).

[7] Section 1361 provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

court acknowledged that mandamus is warranted only where there has been a " 'patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review' " and the agency had "a clear nondiscretionary duty to act" (App., *infra*, 4a (quoting *Nader* v. *Volpe*, 466 F.2d 261, 265-266 (D.C. Cir. 1972)). With respect to members of the putative class whose claims had been reopened and denied after the 1977 amendments, the court held that the Secretary has a duty to reopen them again because "[e]ven if review of those claims did occur, the Secretary did not do so under the proper standard" (App., *infra*, 12a). As to claimants whose claims were first denied after the 1977 amendments, the court held that the Secretary "owes the same duty to these claimants to reopen and consider their claims" (*id.* 12a-13a).

The court next rejected the arguments that it should not order the claims reopened because the claimants failed to exhaust their administrative remedies or seek review in a court of appeals in timely fashion. The court noted that "Congress had the authority to waive the limitation created by the deadlines" (App., *infra*, 15a). With respect to those claims that had been reopened after the 1977 amendments and denied again, the court concluded that, in ordering reopening, "Congress, by implication, waived the thirty and sixty-day deadlines for appeals," and again concluded that "[t]he Secretary has yet to take properly 'into account' the 1977 amendments" (*id.* at 16a). As to the later-filed claims, the court concluded that "[i]t would * * * be contrary to congressional intent to allow" those claims to be treated differently (*ibid.*). Furthermore, the court stated, the 30-day and 60-day deadlines "become largely unmeaningful for actions based on jurisdictional grants outside of" the Black Lung Benefits Act (*id.* at 17a).[8]

[8] The court remanded the case for class certification, noting that "[o]n remand, the district court shall define the class and determine which appellants could appropriately represent it" (App., *infra*, 2a n.1).

After the court decided this case, the Seventh Circuit issued it decision in *Strike* holding that the Secretary's interim regulations do not conflict with Section 902(f)(2). Although that decision was called to the attention of the Eighth Circuit, the government's petition suggesting rehearing en banc was denied (App., *infra*, 23a).

REASONS FOR GRANTING THE PETITION

The court of appeals has ordered the Department of Labor to embark on a potentially enormous reopening of closed cases that will impose a massive administrative burden. The court of appeals reached that conclusion by determining that mandamus was warranted and that the failure of class members to exhaust their administrative remedies or seek judicial review in timely fashion posed no bar to further review of their claims. In light of the conflict in the circuits on the underlying merits issue concerning the propriety of the Secretary's interim regulation, the Solicitor General has authorized the filing of a petition for a writ of certiorari in a case presenting that issue, which will be filed in December 1987. We suggest that this petition be held pending the resolution of the merits issue since, if the Court concludes that the Secretary's interim regulation does not conflict with Section 902(f)(2), then it necessarily follows that the court of appeals erred in ordering the reopening of claims decided under that interim regulation. However, if the Court decides not to review the merits issue, or ultimately decides that Labor's interim regulation is in conflict with Section 902(f)(2), then plenary review is warranted here because of the substantial burden imposed by the court of appeals' decision and its misapplication of governing legal principles.

1. Without legal justification, the decision below imposes a potentially enormous administrative burden on the Department of Labor. The Department reviewed its summaries of black lung benefits claims in light of the decision

below and found that 2,855 claims filed by claimants residing in the Eighth Circuit had been denied under Labor's interim regulation where the miner had not worked ten years or more in coal mines.[9] Thus, under the court of appeals' order, the records in those 2,855 cases will have to be retrieved and analyzed to determine whether the claimant submitted X-ray evidence showing the presence of pneumoconiosis and is therefore a member of the putative class. Members of the class will then have to be located and their claims readjudicated under the interim presumption in 20 C.F.R. 410.490. Since more than 80 percent of the 2,855 claims were finally decided before 1982, it would be difficult to locate members of the putative class.

It is not clear whether the district court, on remand, would certify a class limited to claimants who worked in the Eighth Circuit, as the data above assume, or instead would certify a nationwide class.[10] The Department has not analyzed the summary data available concerning claimants from outside the Eighth Circuit. However, only about three percent of black lung benefits claimants reside in that Circuit; most claimants reside in the Third and Sixth Circuits. Therefore, if the summary data on claimants residing in the Eighth Circuit is typical, the records for approximately 94,000 claims would have to be retrieved and analyzed if the decision below were extended

---

[9] Not all of the summaries contain an entry showing the claimants' number of years of coal mine employment. Accordingly, review of the full records (most of which have been retired to federal records centers) could show that some of the 2,855 claimants had worked in coal mines for more than ten years and, accordingly, are not members of the putative class.

[10] It would clearly be unwarranted to include claimants residing in the Seventh Circuit in the class, in light of the decision in *Strike*. However, the district court might certify a nationwide class excluding claimants residing in the Seventh Circuit.

nationwide. Since administrative law judges currently issue about 10,000 decisions each year in black lung benefits cases, reopening that many cases would plainly create a significant backlog if analysis of the records indicates that many of the 94,000 claimants are members of the class.

It is, of course, impossible to determine exactly what the end result of the reopening effort would be. However, while it is certain that the administrative effort would be substantial, it is possible that the results in relatively few cases would be changed. HEW's Part B regulation, after all, merely granted a claimant a *rebuttable* presumption of total disability. Since the members of the putative class were unable to prove that they were totally disabled (and some of them were twice unable to establish total disability), it would seem likely that the presumption of total disability would be rebutted in most cases. Furthermore, it should be noted that any claimant who is now totally disabled may file a new claim under the final regulations governing the program, even if a prior claim was denied (see 20 C.F.R. 727.309(d)). While the presumption available under HEW's Part B regulation is not available under the final regulations, the fact that new claims can be filed ensures that any claimant who became totally disabled as a result of pneumoconiosis arising out of coal mine employment can obtain benefits.[11]

2. The court of appeals erred in concluding that it had jurisdiction to issue a writ of mandamus to compel the Secretary of Labor to reopen the claims of the members of the putative class, which had previously been finally denied.

---

[11] At least some forms of pneumoconiosis are progressive (see Lopatto, *supra*, 85 W. Va. L. Rev. at 680), so that it is likely that some claimants who were not totally disabled when they first applied for benefits have since become totally disabled, even if they have not been exposed to coal dust in the interim.

"The common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984). It was an error for the court of appeals to find mandamus jurisdiction under Section 1361. First, the members of the putative class failed to exhaust the avenues of relief open to them. If they thought that Labor's interim regulations were not consistent with the requirements of Section 902(f)(2), they could have challenged those interim regulations on appeals from denials of their claims by the Benefits Review Board, as a number of other claimants have done.[12]

Second, the Secretary of Labor breached no clear nondiscretionary duty owed members of the putative class. The Secretary followed the directive of Section 902(f)(2) and considered (in some cases, reconsidered) claims filed before the final regulations were promulgated under its interim regulation. The court below found a breach of a clear duty only because it had concluded that the interim regulation conflicted with the statute. As an initial matter, we think that conclusion is wrong because, in our view, the interim regulation is fully consistent with the statute. But even if the interim regulation is inconsistent with Section 902(f)(2), mandamus is not warranted. Where the existence

---

[12] The court of appeals stated (App., *infra*, 4a) that the violation of Section 902(f)(2) that it found was irremediable under the scheme established by the Black Lung Benefits Act because, while "[t]he Department of Labor has agreed to follow *Coughlan* in all cases pending in the Eighth Circuit after the date of that decision [,] * * * [it] refuses to reopen the claims of the 'class' members." But while the alleged violation is now irremediable under the Act because the members of the putative class abandoned their claims, that does not mean that mandamus relief is available. To the contrary, it is barred *because* they failed to "exhaust[] all other avenues of relief" (*Ringer*, 466 U.S. at 616).

of a duty "depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 219 (1930). Otherwise stated, "the mandamus remedy is only available 'under *exceptional* circumstances of *clear illegality*. When the performance of official duty calls for a construction of governing law, the [federal] officer's interpretation will not be disturbed by a writ of mandamus unless it is *clearly wrong* and his official action is arbitrary and capricious.' " *Homewood Professional Care Center, Ltd.* v. *Heckler*, 764 F.2d 1242, 1251 (7th Cir. 1985) (emphasis in original), quoting *Americana Healthcare Corp.* v. *Schweiker*, 688 F.2d 1072, 1084 (7th Cir.), cert. denied, 459 U.S. 1202 (1982). In light of the conflict in the circuits (and the dissenting opinions in two of the cases where the courts held that the Secretary's interim regulation conflicts with the statute), it can hardly be argued that the Secretary's construction is so clearly wrong as to warrant mandamus.[13]

[13] The District of Columbia Circuit has stated that "[t]he requirement that a duty be 'clearly defined' to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of the controlling statute is in doubt. * * * As long as the statute, once interpreted, creates a peremptory obligation for the officer to act, a mandamus action will lie." *13th Regional Corp.* v. *United States Dep't of the Interior*, 654 F.2d 758, 760 (1980). It is not clear whether that court would conclude that mandamus would be warranted in a case where it had construed a statute contrary to the interpretation of an agency and other courts. Such a conclusion would seem contrary to the District of Columbia Circuit's prior statement: "When the performance of official duty calls for a construction of governing law, the officer's interpretation will not be disturbed by a writ of mandamus unless it is clearly wrong" since "[m]andamus is an extraordinary remedy, and it is to be employed only under exceptional circumstances, for courts will intervene to disturb the determinations of administrative officers only in clear cases of illegality." *Association of American Medical Colleges* v. *Califano*, 569 F.2d 101, 111 n.80 (1977).

In addition, the court of appeals failed to recognize that the claims of the members of the putative class were not subject to reopening since the claimants had failed to seek administrative or judicial review within the time limits Congress established. If the claimants were attempting to avoid final judgments rendered by a court, there would be no question that they would be barred by res judicata. "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). Relitigation is barred even if the final, unappealed judgment was "wrong or rested on a legal principle subsequently overruled in another case" (*ibid.*).

Because final decisions had been rendered against the members of the putative class, the court below erred in ordering their claims reopened. As this Court stated in *University of Tennessee* v. *Elliott*, No. 85-588 (July 7, 1986), slip op. 9 n.6 (quoting Section 83 of the Second Restatement of Judgments (1982)), " '[w]here an administrative forum has the essential procedural characteristics of a court, * * * its determinations should be accorded the same finality that is accorded the judgment of a court.' "[14] One exception to that rule, according to the Restatement, is that res judicata does not apply following an administrative decision when it "would be incompatible with a legis-

[14] This Court has not addressed whether an unappealed administrative judgment bars a party from litigating purely legal issues that could have been raised in the administrative action or on appeal of the administrative judgment. The Court has stated that "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966). That statement leaves open the question whether the parties are similarly barred from litigating questions of law that could have been raised: "The Court's statement limited res judicata to 'disputed issues of fact,' but it did not say and probably would not say that res judicata never applies to disputed issues of law." 4 K. Davis, *Administrative Law Treatise* 49 (1983).

lative policy" (§ 83(4)). While the court of appeals did not cite the exception, it essentially applied it in concluding (App., *infra,* 15a-17a) that Congress intended to waive the failure on the part of the members of the putative class to exhaust their administrative remedies or seek judicial review in timely fashion. Congress did in fact waive the deadlines in the case of claimants who had been denied benefits prior to the 1977 amendments under HEW's regulations by ordering that their claims be reopened. But those claims *were* reopened and reconsidered and the court of appeals plainly erred in concluding that it could order reopening again. Nothing in the statue suggests that Congress intended to abolish the deadlines it had established, so that claims are permanently subject to reopening by the courts.[15]

3. Although the decision below is wrong and imposes substantial burdens on the Department of Labor, it is not necessary for the Court to grant review at this time. Approximately 10,000 black lung benefits claims filed before Labor's final regulations took effect—and hence still subject to review under the Secretary's interim regulation pursuant to Section 902(f)(2)—are still pending. In light of the conflict in the circuits and the substantial number of these cases that may be affected by the conflict, the Solicitor General has authorized the filing of a petition for a writ of certiorari asking the Court to review the question whether

[15] The court of appeals cited (App., *infra,* 16a) *Bowen* v. *City of New York,* No. 84-1923 (June 2, 1986), in support of its conclusion that reopening is not barred because the claims had been finally denied. However, the decision in that case supports the conclusion that reopening is not appropriate here. The Court recognized that "exhaustion is the rule in the vast majority of cases" (slip op. 18). It concluded that tolling of statutes of limitations is warranted "in the rare case such as this" (*id.* at 13) where an "unrevealed policy" was implemented (*id.* at 17). There was, of course, no secret policy here; the Secretary's interim regulations have been published in the Code of Federal Regulations since they were promulgated in 1978.

the Secretary's interim regulation is consistent with Section 902(f)(2). That petition should be filed in December 1987.[16] If the Court reviews the merits issue and upholds the interim regulations, the reopening ordered by the court below is plainly unwarranted. Accordingly, this petition should be held for consideration of the merits case.

If the Court decides not to review the merits issue or if it resolves that issue contrary to the government's position, plenary review of the question presented here is warranted. The decision below imposes substantial burdens on the government and is based on an application of mandamus that so far departs from the usual course of judicial proceedings that it warrants this Court's review. Furthermore, if the court below had jurisdiction under the mandamus statute, its decision to order the claims of the members of the putative class reopened raises significant questions concerning the finality of administrative adjudications. As noted (p. 15 n.14, *supra*), this Court has not decided whether the same principles of res judicata that apply when a court has previously decided a case also bar further proceedings where a claimant failed to pursue a legal argument that could have been raised in administrative proceedings or on appeal from the administrative judgment. That is an important question of federal law that has not been, but should be, settled by this Court.

[16] The Sixth Circuit denied rehearing in *Kyle* on September 22, 1987, so a petition for a writ of certiorari is due December 21, 1987. The Fourth Circuit denied rehearing in *Broyles* on September 30, 1987, so a petition for a writ of certiorari is due on December 29, 1987.

CONCLUSION

The petition for a writ of certiorari should be held pending disposition of *Kyle* v. *Director, Office of Workers' Compensation Programs,* 819 F.2d 139 (6th Cir. 1987), and *Broyles* v. *Director, Office of Workers' Compensation Programs,* 824 F.2d 327 (4th Cir. 1987). Plenary review is warranted if the Court does not grant the petition in *Kyle* or *Broyles* or decides the question presented in those cases contrary to the position of the government.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Counsel for Appellate Litigation

EDWARD D. SIEGER
Attorney
Department of Labor

NOVEMBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 86-1295, 86-1315

IN RE JAMES SEBBEN, JOHN COSSOLOTTO, BRUNO LENZINI, CHARLES TONELLI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PETITIONERS

JAMES SEBBEN; JOHN COSSOLOTTO; BRUNO LENZINI; AND CHARLES TONELLI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS

v.

WILLIAM E. BROCK, III; UNITED STATES SECRETARY OF LABOR; UNITED STATES DEPARTMENT OF LABOR; AND STEVEN BREESKIN, ACTING DEPUTY COMMISSIONER, U.S. DEPARTMENT OF LABOR, DIVISION OF COAL MINE WORKERS' COMPENSATION, APPELLEES

Submitted Oct. 16, 1986
Decided March 25, 1987

Rehearing and Rehearing En Banc
Denied June 25, 1987

Before: HEANEY and ROSS, Circuit Judges, and LARSON,* Senior District Judge.

HEANEY, Circuit Judge.

The appellants, James Sebben, John Cossolotto, and Charles Tonelli, are claimants and representatives of a group of claimants seeking benefits under the Black Lung

---

* The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

Benefits Act, 30 U.S.C. §§ 901-42 (1982 & Supp. III 1985) (codified as amended in 1972, 1978, 1981 and 1984) (the BLBA). In the district court, they sought certification of a class and a writ of mandamus under 28 U.S.C. § 1361 to compel the Department of Labor to consider or reconsider the claims of the proposed class under 30 U.S.C. § 902(f)(2) (1982) as interpreted by *Coughlan v. Director, Officer of Workers' Compensation Programs,* 757 F.2d 966 (8th Cir. 1985). The district court denied the application for the writ and dismissed the claim without certifying the class.[1] It held that *Coughlan* was not applicable to claims previously denied by the Department of Labor and not timely pursued on appeal. It further held that it was without jurisdiction because the BLBA conferred exclusive jurisdiction upon the circuit courts of appeals to review administrative decisions under the BLBA.

On appeal, the Secretary of Labor (Secretary) concedes that the proper standard for review of the appellants' BLBA claims is articulated in *Coughlan*. The Secretary has also agreed to apply *Coughlan* in all pending cases in the Eighth Circuit.

In *Coughlan*, this Court considered claims of miners and their survivors who argued that the miners had

[1] Because the district court never certified the class, we refer to the group of claimants who intended to join it as the "class," with the recognition that it is not a class within the meaning of Fed.R.Civ.P. 23. *See Baxter v. Palmigiano,* 425 U.S. 308, 310-11 n.1, 96 S.Ct. 1551, 1554 n.1, 47 L.Ed.2d 810 (1976).

On remand, the district court shall define the class and determine which appellants could appropriately represent it. If some or all cannot, application may be made to the district court for designation of the appropriate class representatives. We note that one of the appellants named in this appeal, Bruno Lenzini, has been awarded benefits under the BLBA. *Lenzini v. Director, Office of Workers' Compensation Programs*, No. 86-1001, slip op. (8th Cir. May 8, 1986). Lenzini therefore would not be an appropriate class representative.

become totally disabled due to black lung disease (pneumoconiosis) under the BLBA. The presence of pneumoconiosis in *Coughlan* was proved by a positive chest x-ray of the miner. We held that a positive x-ray was sufficient to create a rebuttable presumption of pneumoconiosis under 20 C.F.R. § 410.490 (1986) (known as the "interim" regulation). We reasoned that even though the presumption of pneumoconiosis in section 410.490 originally only applied to claims made prior to July 1, 1973, a 1977 amendment to the BLBA, 30 U.S.C. § 902(f)(2) (1982), revived the presumption and made it applicable to the claims presented. *Coughlan*, 757 F.2d at 967-68.

The appellants allege that they and the "class" all filed claims on or before March 31, 1980, thus entitling them to the section 410.490 presumption accorded to the claimants in *Coughlan.*[2] They further allege that they all submitted positive x-rays as evidence of total disability but were not afforded the section 410.490 presumption of disability mandated by *Coughlan.*

The Secretary contends that, even assuming the substantive validity of the "class" members' claims, the district court properly dismissed the action because: (1) the district court lacked jurisdiction; (2) the appellants and class members failed to exhaust their administrative remedies; and (3) many of the potential class members failed to file timely administrative and judicial appeals and thus are jurisdictionally barred from seeking review at this time.

I. JURISDICTION OF THE DISTRICT COURT.

At the outset, we accept the proposition that where Congress establishes a special statutory review procedure

[2] In order for the claimants to be accorded the presumption contained in section 410.490(b), 30 U.S.C. § 902(f)(2) required that they file a claim on or before the effective date of 20 C.F.R. Part 718 (1986), which would mean before April 1, 1980. *See* 20 C.F.R. § 718.1(b).

for administrative actions, that procedure is generally the exclusive means of review for those actions. *Louisville and Nashville R. Co. v. Donovan*, 713 F.2d 1243, 1246 (6th Cir.1983); *see also Heckler v. Ringer*, 466 U.S. 602, 616-17, 104 S.Ct. 2013, 2022, 80 L.Ed.2d 622 (1984) (refusing to consider whether mandamus jurisdiction is barred by 42 U.S.C. § 405(h) of the Social Security Act). Furthermore, the unavailability of simultaneous review of administrative actions in both the district court and the circuit court of appeals is strongly presumed. *Louisville & Nashville R. Co.*, 713 F.2d at 1246. In "narrow circumstances" however, "some residuum of federal question subject matter jurisdiction may exist in the district court, although apparently otherwise precluded by a comprehensive statutory review scheme." *Id.* at 1246. That residuum may permit district courts in the proper circumstances to exercise mandamus jurisdiction over the agency under the BLBA. *Id.*

Before a district court can issue a writ of mandamus under section 1361 and exercise jurisdiction outside of that provided in the BLBA, the claimant must show either "patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review." *Id.* (citing *Nader v. Volpe*, 466 F.2d 261, 265-66 (D.C. Cir.1972)). In addition, the claimant must show that the agency, over which jurisdiction is exercised, has a clear nondiscretionary duty to act. *Heckler v. Ringer*, 466 U.S. at 616-17, 104 S.Ct. at 2022.

The circumstances of this case reveal that review of claims under the BLBA cannot remedy the infringement on the substantial rights of the "class" members. The Department of Labor has agreed to follow *Coughlan* in all cases pending in the Eighth Circuit after the date of that decision. The agency, however, refuses to reopen the claims of the "class" members here which were adjudicated prior to *Coughlan* and in which the claimant failed either

to appeal to the Benefits Review Board (BRB) within thirty days after an initial determination, *see* 30 U.S.C. § 932(a) (1982) (incorporating 33 U.S.C. § 921(a) (1982) of the Longshore and Harbor Workers' Act), or within sixty days to the court of appeals after a final agency decision. *See id.* (incorporating 33 U.S.C. § 921(c) (1982) of the Longshore and Harbor Workers Act). Therefore, according to the Secretary, these claimants should not be afforded the benefit of the *Coughlan* decision because the BLBA provides the exclusive means of review of the class members' claims, and the periods of limitation in sections 921(a) and (c) bar their claims.

These claimants, however, deserve to have their claims heard. In the past, claimants under the BLBA have encountered enormous frustration in the processing of their claims due to administrative delays and determinations under improper standards. Congress has repeatedly attempted to ease the burden of proof of disability and to expedite black lung claims. More specifically, the BLBA's legislative history reveals Congress twice, in 1972 and 1977, instructed that then-pending or denied claims be reopened in order that claims could be readjudicated under what Congress believed to be more fair standards of disability.

The BLBA as established in 1969 (originally titled the Federal Coal Mine Health and Safety Act of 1969) provided benefits to coal miners who were totally disabled due to pneumoconiosis. Pub.L.No. 91-173, 83 Stat. 742 (codified as amended at 30 U.S.C. §§ 901-41 (1982 & Supp. III 1985)). The 1969 Act was divided into three sections: Part A (sections 901-02) provided general findings and definitions; Part B (section 921-25) applied to claims filed before December 31, 1972, administered by the Secretary of Health, Education and Welfare; Part C (sec-

tions 931-41) applied to claims made after December 31, 1972.[3]

To qualify for benefits, the 1969 Act required a claimant to establish that the miner (1) had pneumoconiosis, (2) that arose out of coal mine employment, (3) causing total disability or death. 30 U.S.C. § 902 (1976) (codified as amended in 1972). To assist claimants in meeting these requirements, the 1969 Act provided an irrebuttable presumption, *see* 30 U.S.C. § 921(c)(3), and a rebuttable presumption. The rebuttable presumption presumed either that a disabled, 30 U.S.C. § 921(c)(1), or a deceased, 30 U.S.C. § 921(c)(2), miner's pneumoconiosis arose out of coal mine employment if the miner had worked ten years or more in an underground mine.

Claimants under the 1969 Act, however, encountered difficulties in proving total disability under the rebuttable presumption. X-rays initially read as positive were reread as negative by government-retained radiologists ("B-readers"); the standard of disability in the 1969 Act—requiring a miner to be unable to do any substantial work, 30 U.S.C. § 902(f)—proved difficult to meet; and deceased miners' spouses lacked sufficient evidence to prove the miners died from pneumoconiosis. *See* J.S. Lapatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W.Va.L.Rev. 677, 683-84 (1983). Because of the difficulties encountered by black lung claimants in gaining benefits under the 1969 Act, Congress found that the 1969 Act had not benefited "countless miners and their

[3] Part C allowed for alternative compensation either under a state statute meeting federal requirements or, absent such a statute, under a federal compensation system administered by the Secretary of Labor, 30 U.S.C. §§ 931-45 (1982). Under the federal program, the Department of Labor would attempt to locate a responsible mine operator who would make payments for the miner. If no such operator could be identified, payments would be made from federal funds. 30 U.S.C. §§ 932, 934.

survivors who were the intended beneficiaries of the Black Lung program." Senate Rep. No. 92-743, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code and [*sic*] Cong. & Admin.News 2305, 2307. Thus, in 1972, before the effective date of Part C, Congress amended the 1969 Act. Pub.L. No. 92-303, 86 Stat. 153 (1972) (codified at 30 U.S.C. §§ 901-41 (1976)). The 1972 amendments extended the filing deadline under Part B to June 30, 1973, and delayed the effective date of Part C until January 1, 1974. 30 U.S.C. § 925 (1982).[4] The amendment also created an additional rebuttable presumption of pneumoconiosis for a miner without a positive x-ray. The presumption applied if the miner had fifteen years of underground coal mine employment and other evidence of a totally disabling pulmonary or respiratory impairment. 30 U.S.C. § 921(c)(4) (1982).

Finally, in order to redress the problem of excessive denials of past claims, the 1972 amendments required the Secretary of Health, Education and Welfare to reopen and review pending and *denied* claims under the new standards created by the 1972 amendments.[5] These reopened and pending claims were to be evaluated under new "interim" regulations, 20 C.F.R. § 410.490, the same regulations which this Court ultimately considered in *Coughlan*. The purpose of the regulations was to "permit prompt and vig-

[4] Claims filed between June 30, 1973, and January 1, 1974, were covered by 30 U.S.C. § 925.

[5] 30 U.S.C. § 941 (1970) (amended 1972) states:

> The Secretary of Health, Education and Welfare shall, upon enactment of the Black Lung Benefits Act of 1972, generally disseminate to all persons who filed claims under this subchapter prior to May 19, 1972, the changes in the law created by such Act, and forthwith advise all persons whose claims have been denied for any reason or whose claims are pending, that their claims will be reviewed with respect to the provisions of the Black Lung Benefits Act of 1972.

orous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments." 20 C.F.R. § 410.490(a). Under section 410.490, a miner's disability would be presumed to be due to penumoconiosis if he or she submitted a positive x-ray and proved the disability arose out of coal mine employment. § 410.490(b).[6]

Once implemented, the "interim" regulations boosted significantly the number of approvals of Part B claims. J.S. Lopatte [*sic*], *The Federal Black Lung Program: a 1983 Primer,* 85 W.Va.L.Rev. 677, 686 (1983).

Claims filed after January 1, 1974, under Part C, however, encountered obstacles to approval. Because no state black lung programs had been federally approved by 1973, *id.* at 688, the Department of Labor undertook full supervision of the black lung program under Part C. The regulations used by the Department of Labor, 20 C.F.R. §§ 410.101-.476 (1986), proved to be much more restrictive than the interim regulations, and hence, the approval rate slackened considerably.[7]

---

[6] The presumption in 20 C.F.R. § 410.490(b) in pertinent part provides:

> (b) **Interim presumption.** With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:
>
> (1) One of the following medical requirements is met:
>
> (i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis * * *[.]
>
> * * * * * *
>
> (2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

Congress again became dissatisfied with the low approval rate, this time under 20 C.F.R. §§ 410.101-.476 and in 1977, passed the Black Lung Benefits Reform Act of 1977. Pub.L. No. 95-239, 92 Stat. 95.[8] The purpose of the 1977 amendments was the same as the 1972 amendments: to expand the coverage of the original act and to lessen restrictions on eligibility. *See, e.g., Underhill v. Peabody Coal Co.,* 687 F.2d 217, 220 (7th Cir.1982).

In the 1977 amendments, Congress specifically instructed the Secretary to adopt regulations with "criteria" no more restrictive than those in 20 C.F.R. §410.490 and to apply them to all Parts B and C claims, including those pending or *denied* as of March 1, 1978, 30 U.S.C. § 945(b) (1982), as well as those Part C claims filed before April 1, 1980. 30 U.S.C. § 902(f)(2) (1982); *see also* H.R.Rep. No. 95-151, 95th Cong. 2d Sess. 25, 49, *reprinted in* 1978 U.S.Code Cong. & Admin.News, 237, 261, 284 (interpreting Section 12 of Black Lung Benefits Reform Act of 1977); House Conf. Rep. No. 95-864, 95th Cong., 2d Sess. 20, *reprinted in* 1978 U.S.Code Cong. & Admin.News, 308, 314. Thus, Congress once more instructed the Department of Labor to reassess past denials under a more liberal standard of disability.[9]

---

[7] Of the 128,000 Part C claims considered by the Department of Labor prior to March, 1978, only about half were processed. Of the processed claims, 68,100 were denied and 5,000 approved. *Id.* at 691 (citing *House Comm. on Ways and Means, Subcomm. on Oversight,* 97th Cong., 1st Sess., 13 (1981) Print No. 97-14).

[8] Congress also passed the Black Lung Revenue Act of 1977, Pub.L. No. 95-227, 92 Stat. 11, which created the Black Lung Disability Trust Fund. The Trust Fund raised money through an excise tax on the sale of coal to pay benefits where coal mine operator(s) who employed the miner could not be found. 30 U.S.C. § 934.

[9] Congress also instructed the Department of Health, Education and Welfare (now the Department of Health and Human Services) to

After the passage of the 1977 amendments, the Department of Labor adopted 20 C.F.R. Part 727 (1986). It was under these regulations that the Secretary of Labor was to review all claims filed before April 1, 1980, including those pending or denied as of the 1977 amendments.

As we observed in *Coughlan*, however, Part 727 did not provide "criteria" for determining disability under the BLBA, which were no more restrictive than those in the interim regulations contained in section 410.490. Section 410.490(b)(1)(i) presumed total disability due to penumoconiosis upon showing of a positive x-ray and evidence that the impairment arose out of coal mine employment. Section 727.203(a)(1), on the other hand, required a miner to have worked ten years before a positive x-ray would be sufficient to invoke the presumption.[10] *Coughlan* eventually overturned this improper regulation.

---

notify Part B claimants that they had a right to have their pending or denied claim reconsidered under the 1977 amendments. 30 U.S.C. § 945(a)(1). Part B claimants had the option of having: (1) the Secretary of Health, Education and Welfare review the claim based on evidence already in the record "taking into account" the 1977 amendments, § 945(a)(1)(A), and if the claim was denied, it would be transferred to the Department of Labor for review with the opportunity to submit additional evidence, § 945(a)(2)(B); or (2) the claimant could elect to have the claim transferred directly to the Department of Labor with the opportunity to submit additional evidence, § 945(a)(1)(B). If the claimant chose to have the Department of Health, Education and Welfare review the claim, and it approved the claim, the Department would transfer the claim to the Department of Labor with "an initial determination of eligibility" directing that the Department of Labor provide payment of benefits in accordance with Part C. § 945(a)(2)(A).

Since the Department of Health and Human Services is not a party to this suit, we have restricted our analysis to the role of the Department of Labor.

[10] The pertinent part of section 727.203 reads:

> (a) **Establishing interim presumption.** A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title)[.]

It did not, however, determine the fate of those claimants who had been denied benefits under the improper standard from March 1, 1978, to March 27, 1984, when *Coughlan* was decided.

Are the rights of the claimants which were violated sufficiently substantial or are the violations sufficiently patent to justify the invocation of mandamus jurisdiction? From the legislative history of the BLBA, it is clear that Congress has consistently demonstrated a deep concern for the plight of black lung benefits claimants. Congress reopened black lung claims in 1972 and 1977 in order that deserving claimants could more easily obtain benefits. In doing so, Congress overrode the BLBA procedures by specifically requiring the Department of Labor to review not only pending claims but also those claims that had been denied and to do so without regard to the thirty or sixty-day period of limitations in the BLBA. *See* 30 U.S.C. § 932 (1982). By reopening black lung claims twice and requiring adjudication under more liberal standards, Congress demonstrated that it considered the rights involved in those claims to be substantial. Therefore, with respect to those claims pending or denied as of the effective date of the 1977 amendments, March 1, 1978, Congress has indicated that those rights are substantial.

Similarly, those who filed their claims between March 1, 1978, and April 1, 1980, have substantial rights at stake. As previously mentioned, Congress has stated that all claims filed between March 1, 1978, and April 1, 1980 should be treated under the same standard as those

pending or denied as of the 1977 amendments. *See* 30 U.S.C. § 902(f)(2)(C). It should not be necessary for Congress to pass a third act requiring the Secretary to consider these claims under the proper standard.

In order for the district court to exercise mandamus jurisdiction, the agency over which jurisdiction is being exercised must also owe a clear nondiscretionary duty to act. *Heckler v. Ringer*, 466 U.S. at 616-17, 104 S.Ct. at 2022. The Secretary argues that no such duty is owed here. According to the Secretary, neither *Coughlan* nor the BLBA requires the Secretary to review *sua sponte* the denied claims of the claimants here.

The Secretary, while correct in his interpretation of *Coughlan*, ignores the duty created by the 1977 amendments to the BLBA. These amendments *inter alia* require that all pending or denied Parts B and C claims be reviewed under criteria no more restrictive than those contained in the interim regulation, section 410.490. They also require that all future claims be adjudicated under that same standard.

With respect to the claimants here who had claims pending or denied as of the 1977 amendments, Congress explicitly stated that the Secretary owed a duty to reopen their claims and review them under the new standard in the 1977 Amendments. The Secretary did not fulfill this obligation imposed on him by Congress. Even if review of those claims did occur, the Secretary did not do so under the proper standard. Therefore, the Secretary still owes this duty to these claimants.

As to the claims filed between the effective date of the 1977 amendments, March 1, 1978, and April 1, 1980, Congress has stated that these claims should be judged under the same standard. *See* 30 U.S.C. § 902(f)(2) (1982). The Secretary therefore owes the same duty to these claimants

to reopen and consider their claims under section 410.490.[11]

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Besides arguing that the BLBA excludes the district court from exercising jurisdiction over the Department of Labor, the Secretary also contends that no court can review the appellants' or any "class" members' claims until they have exhausted their administrative remedies.

Before discussing this issue, we must clarify what claims of the appellants and the "class" are at issue. As stated in Section I, the district court could not properly exercise mandamus jurisdiction and determine *the validity* of the "class" members' claims for benefits. The duty which the district court could require the Secretary to perform is a reopening of claims wrongfully denied under section 727.203(a) so that they could be considered under section 410.490. Once the Secretary has reopened the claims, the appellants and the "class" members must exhaust their administrative remedies with regard to their substantive claims. This Court therefore need only decide whether the "class" members must exhaust their administrative remedies in seeking to have their claims reopened and considered under section 410.490.[12]

The Supreme Court has adopted a pragmatic approach to statutory finality requirements. *Bowen v. City of New York*, ___ U.S. ___, ___-___, 106 S.Ct. 2022, 2031-33, 90 L.Ed.2d 426, 477-78 (1986). *See also Polaski*

---

[11] Because we hold the district court has jurisdiction under 28 U.S.C. § 1361, we do not consider appellant's claim that this court has mandamus jurisdiction under 28 U.S.C. § 1651.

[12] As noted in the previous section, the Secretary has agreed to follow *Coughlan* in all claims now pending in the Eighth Circuit. We construe this agreement to apply to pending claims in which the *Coughlan* issue was not specifically raised but is present.

v. Heckler, 751 F.2d 943, 951 (8th Cir.1984) (*citing Mental Health Ass'n of Minnesota v. Heckler*, 720 F.2d 965, 969 (8th Cir.1983)), *vacated and remanded*, ____ U.S. ____, 106 S.Ct. 2885, 90 L.Ed.2d 974 (1986), *reinstated*, 804 F.2d 456. In *Mathews v Eldridge*, 424 U.S. 319, 330, 96 S.Ct. 893, 900, 47 L.Ed.2d 18 (1976), the Court held that waiver of the exhaustion requirement is appropriate "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate."

The circumstances of this case reveal that deference to the agency is not appropriate. Although the Department of Labor has agreed to follow *Coughlan* in all cases still pending in the Eighth Circuit after the date of that decision, the agency refuses to reopen claims adjudicated prior to *Coughlan* where the claimant failed either to appeal to the BRB within thirty days after an initial determination or within sixty days to the court of appeals after a final agency decision. Further consideration of this issue by the Department of Labor will not in any way clarify or alter the agency's position. *See Mental Health Ass'n of Minnesota*, 720 F.2d at 970. Furthermore, this is not a case where agency expertise is needed to resolve the legal issue. *See Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693, 702 (6th Cir.1985) (certain procedures of the Federal Mine Safety and Health Review Commission held unconstitutional; coal mine operator's failure to exhaust administrative remedies not preclusive of judicial review). The matter involved is strictly legal: whether the Department of Labor owes a statutory duty to the "class" members to reopen their claims. We believe it does. Therefore, the "class" members do not have to exhaust their administrative remedies with regard to the issue of the reopening of their claims.

III. PERIOD OF LIMITATIONS.

The Secretary argues that even if he owes a clear substantive duty, a writ of mandamus cannot issue because the claims of "class" members may be procedurally barred by their failure to take timely administrative or judicial appeals from the denials of their claims under the BLBA. Thus, according to the Secretary, the Department of Labor is without jurisdiction to reopen such claims, and this Court is without jurisdiction to hear this appeal.

The statutory review scheme in the BLBA, as devised by the 1972 amendments, provides that a compensation order by an administrative law judge must be appealed within thirty days of issuance to the BRB. 30 U.S.C. § 932(a) (1982) (incorporating 33 U.S.C. § 921(a) (1982) of the Longshore and Harbor Workers' Compensation Act). Decisions of the BRB must be appealed to the circuit courts of appeals within sixty days. *Id.* (incorporating 33 U.S.C. § 921(c) (1982) of the Longshore and Harbor Workers' Compensation Act).

We hold that despite these administrative and judicial appeals limitations, the Department of Labor has jurisdiction to reopen the claims of the "class" members whose claims were wrongfully denied under 20 C.F.R. § 727.203(a), although the denials may not have been timely appealed.

As discussed in Section I, the Secretary continues to owe a duty to all "class" members whose claims were not properly reopened and adjudicated according to the eligibility standard recognized in *Coughlan*. That duty arises for all claims pending or denied as of the 1977 amendments from 30 U.S.C. § 945 of the BLBA in which Congress, by implication, waived the thirty and sixty-day deadlines for appeals of those claims under the BLBA.

Clearly Congress had the authority to waive the limitation created by the deadlines. Because the appeals dead-

lines are creatures of legislation, Congress could change or disregard the deadlines regardless of whether the deadlines are considered jurisdictional. While any disregard or lengthening of the thirty or sixty-day periods must be strictly construed as an extension of a waiver on sovereign immunity, *Block v. North Dakota*, 461 U.S. 273, 287, 103 S.Ct. 1811, 1819, 75 L.Ed.2d 840 (1983), a court cannot restrict the waiver more severely than Congress intended. *Bowen v. City of New York*, ___ U.S. at ___, 106 S.Ct. at 2029, 90 L.Ed.2d at 474 (citing *Block*, 461 U.S. at 287, 103 S.Ct. at 1819).

In addition, section 945(b)(1) states that review by the Secretary of Labor of those claims should "tak[e] into account the amendments made to this part by the Black Lung Benefits Reform Act of 1977." The Secretary has yet to take properly "into account" the 1977 amendments. Therefore, the Secretary continues to have this obligation to reopen these claims under the proper standard as recognized in *Coughlan*.

In regard to those claims filed between March 1, 1978, and April 1, 1980, Congress also stated in section 902(f)(2)(c) that the Secretary of Labor should not apply criteria more restrictive than those contained in 20 C.F.R. § 410.490. Thus, although Congress never directed that these claims be reopened, Congress did instruct that these claims be adjudicated under the same standard as those pending or reopened under the 1977 amendments. It would therefore be contrary to congressional intent to allow claims pending or denied as of March 1, 1978, to be treated under a different standard than claims filed between March 1, 1978, and April 1, 1980. Therefore, any claims filed between March 1, 1978, and April 1, 1980, which were subsequently denied should be reopened along with those claims pending or denied as of March 1, 1978.

The Secretary also contends that the thirty- and sixty-day periods of limitation in 33 U.S.C. § 921(a) and (c) are jurisdictionally based and limit the district court's mandamus jurisdiction.[13] We disagree. We find no grounds for concluding that these periods of limitations affect the district court's mandamus jurisdiction. *See Ellis v. Blum*, 643 F.2d 68, 78-82 (2d Cir.1981) (determining that 42 U.S.C. § 405(h) of the Social Security Act does not completely prohibit mandamus jurisdiction in the district courts to review agency action).

The periods of limitations in 33 U.S.C. § 921(a) and (c) exist within the BLBA's specific statutory review scheme and become largely unmeaningful for actions based on jurisdictional grants outside of the BLBA, such as mandamus under section 1361. *See City of New York v. Heckler*, 742 F.2d 729, 739 n. 7 (2d Cir.1984) (mandamus

---

[13] As the Secretary observes, three Circuits have held the thirty-day administrative appeal period to be jurisdictionally based. *See Insurance Co. of North America v. Gee*, 702 F.2d 411 (2d Cir. 1983); *Wellman v. Director, Office of Workers' Compensation*, 706 F.2d 191 (6th Cir.1983); *Bennett v. Director, Office of Workers' Compensation*, 717 F.2d 1167 (7th Cir.1983). And, four Circuits, including this Circuit, have held that the sixty-day judicial appeal period is jurisdictional. *Clay v. Director, Office of Workers' Compensation*, 748 F.2d 501 (8th Cir.1984); *Pittson Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir.1976), *aff'd sub nom., Northwest Marine Terminal v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977); *Midland Ins. Co. v. Adam*, 781 F.2d 526 (6th Cir.1985); *Arch Mineral Corp. v. Office of Workers' Compensation Programs*, 798 F.2d 215 (7th Cir.1986).

The nature of the periods of limitations in 33 U.S.C. § 921(a) and (c), however, may have to be reevaluated in light of *Bowen v. City of New York*, ___ U.S. at ___, 106 S.Ct. at 2022, 90 L.Ed.2d at 462. In *City of New York*, a class sued the Social Security Administration arguing that an unlawful unpublished policy of the Administration caused deserving claimants to be denied benefits. ___ U.S. at ___, 106 S.Ct. at 2026, 90 L.Ed.2d at 470. Many members of the class had not appealed their denials within sixty days. The Court found that the sixty-day requirement in 42 U.S.C. § 405(g) was not a jurisdictional bar to review by the federal courts.

jurisdiction of district court in social security action unaffected by sixty-day period of limitations in 42 U.S.C. § 405(g)), *aff'd on other grounds, City of New York,* ___ U.S. at ___, 106 S.Ct. at 2022, 90 L.Ed.2d at 462. Specifically, neither the thirty-day limitation on administrative appeals nor the sixty-day limitation on appeals to the circuit courts contemplates a claim before the district court.[14] Therefore, once it has been determined, as it was in Sections I and II, that the BLBA permits, in limited circumstances, the exercise of mandamus jurisdiction by the district court and that the circumstances of this case fit within those limitations, the periods of limitations contained in the BLBA cannot be considered a further limitation on the mandamus jurisdiction of the district court.

IV. CONCLUSION.

On remand, the district court should certify a class consisting of those persons who (1) have filed claims for benefits under the BLBA between December 30, 1969, and April 1, 1980; (2) have claimed a disability due to pneumoconiosis caused by employment in the coal mining industry; (3) have submitted a positive x-ray as proof of the presence of pneumoconiosis; (4) have been denied the benefit of the presumption of pneumoconiosis contained in 20 C.F.R. § 727.203(a)(1) because they did not prove that they had worked ten years in the coal mines; (5) were not afforded the opportunity to submit a claim under 20 C.F.R. § 410.490; and (6) do not have claims under 20 C.F.R. § 727.203(a)(1) currently pending before the Department of Labor. We emphasize that the Secretary is to consider each claim individually and that appeals from these decisions will be made in accordance with the review scheme of the BLBA.

[14] 33 U.S.C. § 918 grants jurisdiction to the district court for the limited purpose of collecting default compensation payments. This provision is irrelevant to this dispute.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 85-589-A

JAMES SEBBEN, ET AL., PLAINTIFFS

v.

WILLIAM E. BROCK, III, ET AL., DEFENDANTS

[Filed Feb. 6, 1986]

RULING ON MOTION TO DISMISS

This case comes before the Court on defendant's motion to dismiss for lack of subject matter jurisdiction. A hearing on the motion was held on January 30, 1986. Appearances are noted in the clerk's minutes for that date.

Under the Black Lung Benefits Act, 30 U.S.C. §§ 901-45, a coal miner is entitled to disability benefits if he is totally disabled by pneumoconiosis arising out of his coal mine employment. A presumption of total disability arises from evidence of a chest x-ray establishing the existence of pneumoconiosis. 20 C.F.R § 410.490(b)(1)(i). In *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985), the court held that this presumption is available in cases covered by a 1977 amendment to the Act.

Plaintiffs are unsuccessful Black Lung benefits applicants who contend that they were erroneously denied the presumption of total disability recently recognized in

Coughlan. They seek a writ of mandamus directing defendants to review past applications under the Act to identify applicants who should have received the benefit of the presumption.

Plaintiffs rest their claim for jurisdiction in this Court on 28 U.S.C. § 1361, which reads in its entirety: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." This statute has been construed to authorize district court intervention if an officer is acting without authority, contrary to a clear duty, or in clear abuse of his discretion. Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction 2d § 3655, see *Miller v. Ackerman*, 488 F.2d 920 (8th Cir. 1973) (official conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted).

In the case at hand, plaintiffs assert that defendants had a duty to apply the presumption of § 410.490(b), but failed to do so. As a result, plaintiffs argue, defendants now have a duty to reconsider past applications. While *Coughlan* supports the premises to plaintiffs' syllogism, the conclusion does not necessarily follow. The opinion in *Coughlan* is silent with regard to whether its holding should be retroactively applied, and the Court knows of no other source for the duty advanced by plaintiffs. Accordingly, it would not be proper for the Court to exercise mandamus jurisdiction.

There is a second, more fundamental, reason for this Court to decline jurisdiction. Congress has conferred upon the circuit courts of appeal sole and exclusive jurisdiction to review administrative action under the

Black Lung Benefits Act.[1] E.G. [*sic*], *Louisville and Nashville Railroad Co. v. Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983). Thus, the proper procedure for contesting defendants' action or inaction is to exhaust the administrative remedies provided under the statute and then to seek review, if desired, in the court of appeals, rather than to pursue a writ of mandamus in this Court.

The Court recognizes that requirements of finality and formality impose obstacles that in rare instances might preclude statutory court of appeals review of agency actions. See Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 3943. Under such circumstances, an argument can be made that Congress did not intend to forbid the district courts from taking jurisdiction. "Generally, however, when Congress has specified a procedure for judicial review of administrative action, courts will not make nonstatutory remedies available without a showing of patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily-prescribed method of review . . . ." *Louisville and Nashville Railroad Co. v. Donovan*, 713 F.2d 1243, 1247 (6th Cir. 1983), quoting *Nader v. Volpe*, 466 F.2d 261, 265-66 (D.C. Cir. 1972). Here, as indicated earlier, plaintiffs have not made the required showing. If plaintiffs are, in fact, precluded from obtaining statutory court of appeals review, perhaps resort may be held to the All Writs Act, 28 U.S.C. §1651, which empowers courts of appeals to "issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ." In light of the clear Congressional preference for circuit court review of matters pertaining to the Black Lung Benefits Act, and in further view of the circuit courts' expertise in these matters, such an approach should be favored over mandamus relief by this Court.

---

[1] The Act allows for district court jurisdiction in only two very narrow situations involving enforcement of compensation orders.

IT IS THEREFORE ORDERED that defendants' motion to dismiss plaintiffs' action is hereby granted.
Signed this 6 day of February, 1986.

W. C. STUART, JUDGE

W. C. Stuart, Judge
Southern District of Iowa.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1295

IN RE: JAMES SEBBEN, JOHN COSSOLOTTO, BRUNO LENZINI, CHARLES TONELLI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PETITIONERS

No. 86-1315SI

JAMES SEBBEN, ET AL., APPELLANTS

v.

WILLIAM E. BROCK, III, ETC., ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

PETITION FOR WRIT OF MANDAMUS

Appellees' petition for rehearing en banc has been considered by the Court and is denied.
Petition for rehearing by the panel is also denied.

June 25, 1987

Order entered at the Direction of the Court:

/s/ MICHAEL E. GUNS, Chief Deputy

Clerk, U.S. Court of Appeals,
Eighth Circuit.

U.S. GOVERNMENT PRINTING OFFICE: 1987—202 037/60105